

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DIXIE GIERING and U.S. POSTAL SERVICE,
SAN GABRIEL POST OFFICE, San Gabriel, CA

*Docket No. 96-2034; Submitted on the Record;
Issued November 22, 1999*

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
MICHAEL E. GROOM

The issues are: (1) whether the Office of Workers' Compensation Programs met its burden of proof in terminating appellant's compensation benefits for her knee condition; and (2) whether the Office abused its discretion in refusing to reopen appellant's case for a merit review under 5 U.S.C. § 8128(a).

The Board has duly reviewed the evidence of record in this appeal and finds that the Office met its burden of proof in terminating appellant's compensation benefits for her knee condition.

On May 18, 1992 appellant, then a letter carrier, filed a traumatic injury claim (Form CA-1) assigned number A13-983774 alleging that on that date, she scraped her knees and palms when she tripped on a cracked sidewalk. Appellant stated that she also injured her right arm and shoulder, shoulder blades and right collar bone.¹ Appellant worked intermittently between May 18 and August 26, 1992. Appellant was totally disabled between August 26, 1992 and March 4, 1993. Appellant worked intermittently between December 12, 1993 and March 5, 1994. Appellant stopped work on March 6, 1994.

The Office accepted appellant's claim for right shoulder and cervical strain, a contusion of both knees, bilateral carpal tunnel syndrome, acute bursitis and impingement of the right shoulder. The Office authorized right carpal tunnel release which was performed on February 9, 1994.

¹ Previously, on June 14, 1991 appellant filed a claim for an occupational disease (Form CA-2) assigned number A13-0958184 for an injury to her left foot arch which was accepted for plantar fasciitis. On November 6, 1991 appellant filed a Form CA-1 assigned number A13-0967314 for a bruised and scraped knee, tender ankle and left leg sustained on November 4, 1991 which was accepted by the Office for left wrist strain, contusion of the left knee, tibia and ankle, and left plantar fasciitis. A left plantar fasciectomy was authorized and performed on March 5, 1993.

By letter dated June 19, 1995, the Office referred appellant along with a statement of accepted facts, medical records and a list of specific questions to Dr. Clayton E. Patchett, a Board-certified orthopedic surgeon, for a second opinion examination. By letter of the same date, the Office advised Dr. Patchett of the referral.

In a July 12, 1995 letter, Dr. Patchett advised the Office that he was unable to examine appellant on that date due to the confusion about the purpose and scope of the examination. Dr. Patchett stated that he had been asked to see appellant for a second opinion examination regarding her knees. Dr. Patchett further stated that appellant told him that she was not having much knee problems and no one had mentioned surgery. Dr. Patchett also stated that he told appellant that he was only supposed to examine her knees and that appellant responded that the knees were not bothering her, but that she had complaints about other areas. Dr. Patchett requested that the Office provide clarification as to the purpose and scope of appellant's examination.

Dr. Patchett submitted an August 25, 1995 medical report revealing that appellant's carpal tunnel syndrome was employment related, that appellant's ulnar nerve or cubital tunnel syndrome of the elbows, back condition, diabetes, hypertension and gout were not directly related to the May 18, 1992 employment injury, that the May 18, 1992 employment injury aggravated a preexisting anatomical abnormality of appellant's shoulder, and that appellant's knee condition was employment related, but that it had resolved. By letter dated February 15, 1996, the Office advised Dr. Patchett to clarify his opinion regarding appellant's right shoulder and cervical conditions.

By letter dated February 15, 1996, the Office advised Dr. Richard W. Vanis, a Board-certified orthopedic surgeon and appellant's treating physician, to provide comments about Dr. Patchett's report. Specifically, the Office advised Dr. Vanis to respond to Dr. Patchett's findings concerning appellant's medical treatment and recommendation for shoulder surgery and carpal tunnel release.

Dr. Patchett submitted a February 26, 1996 supplemental medical report in response to the Office's February 15, 1996 request accompanied by a work capacity evaluation for musculoskeletal conditions.

By decision dated March 19, 1996, the Office terminated appellant's compensation benefits for her knee condition on the grounds that Dr. Patchett's August 25, 1995 medical report established that appellant had no continuing disability causally related to the May 18, 1992 employment injury. The Office found that appellant would continue to receive compensation benefits for her remaining employment-related conditions.

In an April 8, 1996 letter, appellant requested reconsideration of the Office's decision.

In response to its February 15, 1996 letter, the Office received Dr. Vanis' April 30, 1996 medical report indicating, *inter alia*, that appellant was still having intermittent problems with her knees.

By decision dated May 7, 1996, the Office denied appellant's request for reconsideration without a review of the merits of the claim on the grounds that the evidence submitted was irrelevant and immaterial, and thus, insufficient to warrant review of the prior decision. In an accompanying memorandum, the Office found that appellant had failed to submit any medical evidence supportive of continuing disability of her knees.

Once the Office has accepted a claim and pays compensation, it has the burden of proof of justifying termination or modification of compensation benefits.² After it has determined that an employee has disability causally related to his or her federal employment, the Office may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.³

In the present case, the Office accepted that appellant sustained, *inter alia*, a contusion of both knees due to the May 18, 1992 employment injury. The Office terminated appellant's compensation benefits based on Dr. Patchett's August 25, 1995 medical report. In this report, Dr. Patchett indicated a history of appellant's employment, May 18, 1992 employment injury and medical treatment. Dr. Patchett further indicated a review of appellant's medical records and his findings on physical examination. Dr. Patchett stated that appellant had bilateral carpal tunnel syndrome, right post-carpal tunnel release, right shoulder impingement syndrome, a history of cervicothoracic strain, hypertension, diabetes and gout, post-plantar foot surgery and post-plantar fascial surgery, and bilateral knee contusions. Dr. Patchett provided a detailed opinion regarding appellant's upper extremity, lower back and foot conditions, diabetes, hypertension, and gout and their relationship to the May 18, 1992 employment injury. Regarding appellant's knee condition, Dr. Patchett opined this condition was a result of the May 18, 1992 employment injury, but that appellant's condition had resolved by her own admission and was not an issue at that time. Dr. Patchett further opined that appellant could perform modified duty pending completion of her medical treatment and noted appellant's work restrictions.

The Board finds that Dr. Patchett's August 25, 1995 medical report constitutes the weight of the medical opinion evidence inasmuch as it is well-rationalized and based on an accurate factual and medical background. Because Dr. Patchett's report indicating that appellant's knee condition had resolved constitutes the weight of the medical evidence, the Board finds that the Office properly terminated appellant's compensation benefits for her knee condition.

The Board further finds that the Office did not abuse its discretion in refusing to reopen appellant's case for a merit review under 5 U.S.C. § 8128(a).

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,⁴ the Office's regulations provide that a claimant must:

² *Curtis Hall*, 45 ECAB 316 (1994); *John E. Lemker*, 45 ECAB 258 (1993); *Robert C. Fay*, 39 ECAB 163 (1987).

³ *Jason C. Armstrong*, 40 ECAB 907 (1989).

⁴ 5 U.S.C. §§ 8101-8193. Under section 8128 of the Act, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or on application." 5 U.S.C. § 8128(a).

(1) show that the Office erroneously applied or interpreted a point of law; (2) advance a point of law or a fact not previously considered by the Office; or (3) submit relevant and pertinent evidence not previously considered by the Office.⁵ To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant must also file his or her application for review within one year of the date of that decision.⁶ When a claimant fails to meet one of the above standards, it is a matter of discretion on the part of the Office whether to reopen a case for further consideration under section 8128(a) of the Act.⁷

Subsequent to appellant's April 8, 1996 request for reconsideration, the Office received Dr. Vanis' April 30, 1996 medical report in response to its February 15, 1996 letter. In this medical report, Dr. Vanis stated that appellant was still having intermittent problems with her knees. Dr. Vanis also stated that appellant had complaints about the knee area in a peripatellar distribution which may be related to appellant's conditioning and may be a small part of the association of appellant's nerve deficits from diabetes. However, Dr. Vanis' report is irrelevant to the issue of whether appellant had any continuing employment-related disability from her knees as he did not address whether or how there was causal relation of any current knee condition and the 1982 employment injury.

Inasmuch as appellant has failed to show that the Office erroneously applied or interpreted a point of law, to advance a point of law or a fact not previously considered by the Office or to submit relevant and pertinent evidence not previously considered by the Office, the Board finds that the Office did not abuse its discretion in refusing to reopen appellant's case for a merit review under section 8128(a) of the Act.

⁵ 20 C.F.R. §§ 10.138(b)(1)-(2).

⁶ *Id.* at § 10.138(b)(2).

⁷ *Joseph W. Baxter*, 36 ECAB 228, 231 (1984).

The May 7 and March 19, 1996 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, D.C.
November 22, 1999

George E. Rivers
Member

David S. Gerson
Member

Michael E. Groom
Alternate Member